

FILED
BILLINGS DIV.

2010 MAY 26 PM 2 41

PATRICK E. LARSON, CLERK

IN THE UNITED STATES DISTRICT COURT BY _____
DEPUTY CLERK

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

UNITED STATES OF AMERICA,

Cause No. CR 08-19-BLG-RFC

Plaintiff/Respondent,

vs.

ORDER DISMISSING § 2255 MOTION
WITHOUT PREJUDICE

ELEAZAR SANCHEZ-HERRERA,

Defendant/Movant.

On May 17, 2010, Defendant/Movant Eleazar Sanchez-Herrera (“Sanchez”), a federal prisoner proceeding pro se, filed a motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Sanchez also filed a brief in support of his motion.

None of the documents submitted by Sanchez is signed by an attorney or by Sanchez himself. The documents cannot be considered. If he intended to file a § 2255 motion, Sanchez may do so by resubmitting the documents with an appropriate

ORDER DISMISSING § 2255 MOTION WITHOUT PREJUDICE / PAGE 1

signature.

Further, the § 2255 motion is premature. District courts do not consider § 2255 motions while a direct appeal is pending. Feldman v. Henman, 815 F.2d 1318, 1320 (9th Cir. 1987) (as amended); United States v. Deeb, 944 F.2d 545, 548 (9th Cir. 1991); Rule 5, Rules Governing Section 2255 Proceedings for the United States District Courts, advisory committee's note (quoting Womack v. United States, 395 F.2d 630, 631 (D.C. Cir. 1968)). Sanchez's time to file a petition for writ of certiorari in the United States Supreme Court will not expire until June 30, 2010. Cf. 28 U.S.C. § 2255(f)(1). When his direct appeal is concluded, he may refile his § 2255 motion. Dismissal at this time will not prevent him from filing a § 2255 motion in the future. Slack v. McDaniel, 529 U.S. 473, 485-86 (2000).

This is well-settled law. A certificate of appealability is not warranted. Lozada v. Deeds, 498 U.S. 430, 432 (1991) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

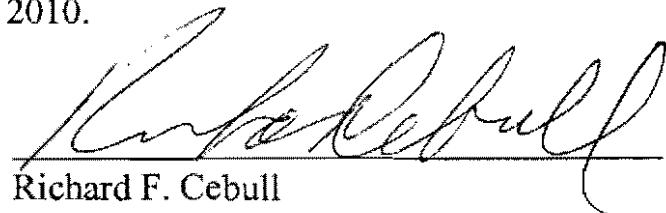
Accordingly, IT IS HEREBY ORDERED as follows:

1. Sanchez-Herrera's § 2255 motion (doc. 67) is DISMISSED WITHOUT PREJUDICE.
2. A certificate of appealability is DENIED.

ORDER DISMISSING § 2255 MOTION WITHOUT PREJUDICE / PAGE 2

3. The Clerk of Court shall enter a judgment of dismissal without prejudice by separate document.

DATED this 26 day of May, 2010.



A handwritten signature in black ink, appearing to read "Richard F. Cebull". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Richard F. Cebull
United States District Court